



LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2012- 4]

Electronic Filing in the Copyright Office of Notices of Intention to Obtain a Section 115 Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Final Rule.

SUMMARY: The Copyright Office is amending its regulations for filing Notices of Intention to obtain a Section 115 compulsory license with the Copyright Office to provide an option for electronically filing notices. By law, such notices may be filed in the Office only when the public records of the Copyright Office do not identify the copyright owner of the musical work and include an address at which notice can be served. In addition, the Copyright Office is amending its regulations to clarify the rules for filing physical Notices of Intention, to clarify that it does not examine Notices of Intention filed with the Office for legal sufficiency, and to include a Privacy Act Advisory Statement.

DATE: Effective [INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Tanya Sandros, Deputy General Counsel, Copyright GC/I&R, P.O. Box 70400 Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366. All prior **Federal Register** notices and comments in this docket are available at: <http://www.copyright.gov/laws/rulemaking.html>.

SUPPLEMENTARY INFORMATION:

Background

Section 115 of the Copyright Act provides that “[w]hen phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person . . . may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.” 17 U.S.C. 115(a)(1).

Included among the conditions that must be met to use the Section 115 compulsory license is the requirement that a person who wishes to obtain a compulsory license “shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office (“Copyright Office” or “Office”) do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.” 17 U.S.C. 115(b)(1).

In 2004, the Copyright Office amended 37 CFR 201.18, the regulations governing Notices of Intention to obtain a Section 115 compulsory license (“Notices”), in order to make the license more functional. 69 FR 34578 (June 22, 2004). Among the 2004 amendments to 37 CFR 201.18 was a provision that allowed that a Notice “may designate any number of nondramatic musical works, provided that the copyright owner of each designated work or, in the case of any work having more than one copyright owner, any one of the copyright owners is the same and that the information required under

paragraphs (d)(1)(i) through (iv) of this section does not vary [*i.e.*, name and contact information of licensee; name and contact information of primary entity making and distributing phonorecords, and information concerning yearly accounting periods]. For purposes of this section, a Notice which lists multiple works shall be considered a composite filing of multiple Notices and fees shall be paid accordingly if filed in the Copyright Office under paragraph (f) of this section (*i.e.*, a separate fee, in the amount set forth in § 201.3(e)(1), shall be paid for each work listed in the Notice).” 37 CFR 201.18(a)(4). The 2004 amendments also allowed licensees to serve Notices directly on copyright owners or designated agents by means of an electronic transmission when the copyright owner or designated agent has a written public policy that it can accommodate such submissions. 37 CFR 201.18(a)(7).

Earlier in the 2004 rulemaking process the Office also considered whether to allow a licensee to file a Notice in the Office in an electronic format. The Office determined that it was not prepared to accept electronically filed Notices because it did not have in place the systems that would accommodate such filings. However, the Office anticipated that such filings would be accepted in the future. The Office did provide that in the case where the licensee intends to license a high volume of nondramatic musical works under Section 115 and would endure significant hardships if required to submit the Notices under the standard practices, the licensee may contact the Licensing Division of the Copyright Office to inquire whether special arrangements could be made for submission of the Notice electronically. 69 FR 11566, 11570 (March 11, 2004).

The Office is aware of a growing need for an electronic filing system for filing Section 115 Notices with the Copyright Office because of the large number of works being used under the compulsory license where service of the Notice cannot be made effectively on the copyright owner. To meet this need, the Office is now preparing to accept specific types of electronically filed Notices addressing multiple nondramatic musical works. Hence, the Office is amending its regulations in § 201.18 by providing for use of an online system for submission of Notices covering multiple nondramatic musical works.

In its Notice of Proposed Rulemaking published in May 2012, the Copyright Office proposed a number of changes to the regulations governing the filing of Section 115 Notices. 77 FR 31237 (May 25, 2012). First, the Office proposed to clarify its rules for submission of Notices in paper form that contain multiple titles of nondramatic musical works. The proposal noted that, while in practice the Office does accept and process Notices with multiple titles in the case where no copyright owner of any of the works can be identified, the regulations do not specifically contemplate this situation. Thus, the Office proposed to amend its regulations to clarify that a Notice filed in a paper format may list multiple works in a single Notice when any of the following circumstances apply: in the case where no copyright owner can be identified from the Copyright Office records for any of the works listed in the Notice; in the case where the copyright owner of each work listed in the Notice is the same and the records of the Copyright Office do not include an address at which notice can be served; or for works having more than one copyright owner, in the case where the works listed in the Notice share a common copyright owner and the records of the Copyright Office do not include

an address at which notice can be served on any of the copyright owners for the subject works. The Office proposed to maintain these distinctions for the paper filings at this time because they provide more concise information to the public reviewing the Notices and facilitates the recordkeeping process for the Office.

The Office also proposed to amend the regulations so that Notices addressing multiple nondramatic musical works may be submitted electronically as XML files, regardless of whether the copyright owner of each designated work is the same, provided that the Notice does not include a nondramatic musical work when the identity and address of at least one of its copyright owners may be found in the public record of the Copyright Office. Fees for such electronic Notices, the Office proposed, would have to be paid through a Copyright Office deposit account (pursuant to § 201.6(b) of the Copyright Office regulations), at least during the introductory period of the online filing process. Use of a deposit account will allow the Office to make any necessary fee payments immediately and it avoids the need to solve the technological and security issues associated with providing a credit card payment in this first iteration of the system.

Further to the question of the processing of electronic Section 115 Notices, the Copyright Office proposed not to require an electronic signature during the initial rollout of the filing process, though it did note plans to add an electronic signature requirement in later versions of the system. Under the initial rollout, because the fee for Notice must be paid through a deposit account, the online system will be able to use the deposit account information to reasonably verify and authenticate the identity of the person submitting and validating Notices.

The Copyright Office, in its May 25, 2012 notice of proposed rulemaking also proposed two additional amendments. The first of these would clarify that the Office does not examine Notices for legal sufficiency, would encourage filers to take care to comply with all the statutory and regulatory requirements pertaining to such Notices, and would note that the Office will notify a prospective licensee when a Notice is not accompanied by payment of the required fee. The second additional amendment would add a Privacy Act Advisory Statement in § 201.18, which would fulfill the Office's obligation to notify the public that Notices with personally identifying information filed with the Office become public records.

Comments

The Office received two comments in response to its notice of proposed rulemaking. One, from Attorney Chris Garvey, supported the proposal to permit the electronic submission of section 115 Notices. The other, from Public Knowledge ("PK"), also supported the electronic filing proposal, along with making further suggestions. PK proposed that electronically filed Notices should be permitted for single nondramatic musical works, and that the Office should "hasten to build the capacity to authenticate licensees and receive payment information without deposit accounts." This latter measure, PK maintained, would result in long-term reduced transaction costs. PK also suggested that the Office "implement a searchable, electronic Notice database for public use" in order to minimize transaction costs between copyright owners and licensees, and avoid the hourly fee that the Copyright Office charges for searches of non-public-facing records.

Discussion

The Office is in agreement with PK in its goal of further improving the functionality of the Office's electronic system "to simplify the Section 115 process for licensees, copyright owners, and the Office itself." The Office believes that the amendments detailed above are an interim step towards meeting this goal. The Office also notes that of the three PK proposals, one is already encompassed in the amendments and the other two will be instituted as part of the upgrades to the Office's technical infrastructure.

Regarding the ability of a person to electronically file a Notice for a single nondramatic musical work, the text of the amendments to § 201.18(a)(4) states that such a Notice "may designate multiple nondramatic musical works." The use of the word "may" indicates that multiple works need not be designated, and that an electronic Notice may be filed for a single work as well. However, a person who files an electronic Section 115 Notice during this initial rollout phase must be enrolled in the Office's deposit account program. In order to accommodate a filer of a Notice identifying only one or a few titles who does not have a deposit account, the Office intends in the future to upgrade the online filing system to require an electronic signature and to accept additional payment options such as credit card payments. At the moment, however, the focus is on offering a mechanism for filing Notices with large numbers of titles in a manner that can easily be administered by the Office at this time.

Regarding PK's desire for a public database of Section 115 Notices, the Office acknowledges that while the search capability of the electronically filed Notices will not be directly available to the public for technical reasons, this will only be the case during the initial rollout of the service, and that future upgrades to the system will include a searchable database.

This Final Rule makes one change to the proposed amendments not suggested by the commenters. In new § 201.18(a)(4)(iii), the phrase "in electronic format" in the first sentence is replaced with "through its electronic filing system." This change merely clarifies the subject of the subsection.

Pilot Program

While the Office is amending its regulations to accept electronic filing of the Section 115 Notices of Intent to Obtain a Compulsory License, it needs to fully test the system before making it available to the public for actual, valid submissions of Notices. Thus, members of the public are invited to participate in a Beta test of the proposed electronic system. Parties wishing to participate in Beta testing should contact Tracie Coleman in the Licensing Division of the Copyright Office at 202-707-3600, tmau@loc.gov. The Beta testing will require participants to upload "test" Notices to the Beta version of the electronic system to ensure proper functionality. "Test" Notices uploaded during the Beta testing phase will not require the submission of a filing fee, and they will not have any legal effect or otherwise be considered valid for licensing purposes. The Beta testing will be limited to selected participants until system testing is complete. Testing is expected to be completed by the time the rule becomes effective.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Final Regulations

In consideration of the foregoing, the Copyright Office amends 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Amend § 201.4(a)(1)(iii) by removing “Original, signed notices” at the beginning of the paragraph and adding “Notices” in its place.
3. Amend § 201.18 as follows:
 - a. By revising paragraph (a)(4);
 - b. By adding paragraph (e)(5);
 - c. By redesignating paragraph (g) paragraph (h);
 - d. By adding a new paragraph (g); and
 - e. By adding paragraph (i).

The additions and revisions read as follows:

§ 201.18 Notice of intention to obtain a compulsory license for making and distributing phonorecords of nondramatic musical works.

(a) * * *

(4) A Notice of Intention shall be served or filed for nondramatic musical works embodied, or intended to be embodied, in phonorecords made under the compulsory license. For purposes of this section and subject to subparagraphs (ii) and (iii), a Notice filed with the Copyright Office which lists multiple works shall be considered a single Notice and fees shall be paid in accordance with the fee schedule set forth in § 201.3(e)(1) if filed in the Copyright Office under paragraph (f)(3) of this section. Payment of the applicable fees for a Notice submitted electronically under this paragraph shall be made through a deposit account established under § 201.6(b).

(i) Except as provided for in paragraph (a)(7), a Notice of Intention served on a copyright owner or agent of a copyright owner may designate any number of nondramatic musical works provided that that the information required under paragraphs (d)(1)(i) through (iv) of this section does not vary and that the copyright owner of each designated work is the same, or in the case of any work having more than one copyright owner, that any one of the copyright owners is the same and is the copyright owner served.

(ii) A Notice of Intention filed in the Copyright Office in paper form may designate any number of nondramatic musical works provided that that the information required under paragraphs (d)(1)(i) through (iv) of this section does not vary, and that the copyright owner of each designated work (or, in the case of works having more than one copyright owner, any one of the copyright owners) is the same and the registration records or other public records of the Copyright Office do not identify the copyright owner(s) of such work(s) and include an address for any such owner(s) at which notice can be served. For purposes of this subparagraph, in the case of works having more than

one copyright owner, a single Notice must identify an actual person or entity as the common copyright owner; the common copyright owner may not be identified as “unknown.” However, a single Notice may include multiple works for which no copyright owners can be identified for any of the listed works.

(iii) A Notice of Intention filed in the Copyright Office through its electronic filing system may designate multiple nondramatic musical works, regardless of whether the copyright owner of each designated work (or, in the case of any work having more than one copyright owner, any one of the copyright owners) is the same, provided that the information required under paragraphs (d)(1)(i) through (iv) of this section does not vary, and that for any designated work, the records of the Copyright Office do not include an address at which notice can be served.

* * * * *

(e) * * *

(5) If the Notice is filed in the Office electronically, the person or entity intending to obtain the compulsory license or a duly authorized agent of such person or entity shall, rather than signing the Notice, attest that he or she has the appropriate authority of the licensee, including any related entities listed, if applicable, to submit the electronically filed Notice on behalf of the licensee.

* * * * *

(g) *Filing date and legal sufficiency of Notices.* The Copyright Office will notify a prospective licensee when a Notice was not accompanied by payment of the required fee. Notices shall be deemed filed as of the date the Office receives both the Notice and the fee, if applicable. If the prospective licensee fails to remit the required fee, the Notice

will be deemed not to have been filed with the Office. However, the Copyright Office does not review Notices for legal sufficiency or interpret the content of any Notice filed with the Copyright Office under this section. Furthermore, the Copyright Office does not screen Notices for errors or discrepancies and it does not generally correspond with a prospective licensee about the sufficiency of a Notice. If any issue (other than an issue related to fees) arises as to whether a Notice filed in the Copyright Office is sufficient as a matter of law under this section, that issue shall be determined not by the Copyright Office, but shall be subject to a determination of legal sufficiency by a court of competent jurisdiction. Prospective licensees are therefore cautioned to review and scrutinize Notices to assure their legal sufficiency before filing them in the Copyright Office.

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(i) *Privacy Act Advisory Statement.* The authority for receiving the personally identifying information included within a Notice of Intention to obtain a compulsory license is found in 17 U.S.C. 115 and § 201.18. Personally identifying information is any personal information that can be used to identify or trace an individual, such as name, address or telephone numbers. Furnishing the information set forth in § 201.18 is voluntary. However, if the information is not furnished, it may affect the sufficiency of Notice of Intention to obtain a compulsory license and may not entitle the prospective licensee to the benefits available under 17 U.S.C. 115. The principal uses of the requested information are the establishment and maintenance of a public record of the Notices of Intention to obtain a compulsory license received in the Licensing Division of the Copyright Office. Other routine uses include public inspection and copying,

preparation of public indexes, preparation of public catalogs of copyright records
including online catalogs, and preparation of search reports upon request.

Dated: September 21, 2012

Maria A. Pallante
Register of Copyrights

Approved by:

James H. Billington,
The Librarian of Congress.

[BILLING CODE 1410-30-P]

[FR Doc. 2012-28906 Filed 11/28/2012 at 8:45 am; Publication Date: 11/29/2012]